No. 80-1295

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In the Supreme Court of the United States

OCTOBER TERM, 1980

CORNET STORES, ET AL., PETITIONERS

v.

ANGELA MARIE BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court had subject matter jurisdiction over this action to challenge the collection of supplemental import duties.

2. Whether the court of appeals erred in affirming the district court's dismissal of petitioners' claims rather than ordering the transfer of those claims to the Court of International Trade.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 632 F. 2d 96. The opinion of the district court (Pet. App. 53a-60a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1980. A motion to alter judgment was denied on December 3, 1980 (Pet. App. 21a). The petition for a writ of certiorari was filed on February 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On August 15, 1971, a 10% ad valorem supplemental duty was imposed by Presidential Proclamation No. 4074, 3 C.F.R. 60 (1971-1975 Compilation), *and in* 85 Stat. 926, upon all dutiable merchandise imported into the United

States. Between August 16, 1971, and December 20, 1971,[1] petitioners paid this supplemental duty upon various goods that they imported (Pet. App. 1a-2a). The record does not show which of the petitioners, if any, complied with the requirements of Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, by filing protests as to the collection of this supplemental duty. Nor does the record show the disposition of any protests that petitioners may have filed. Protests were filed, however, by other importers; the protests were denied, and the importers brought lawsuits in the Customs Court to challenge the validity of Proclamation No. 4074 (Pet. App. 55a). In *United States* v. *Yoshida International, Inc.*, 526 F. 2d 560 (C.C.P.A. 1975), and *Alcan Sales* v. *United States*, 534 F. 2d 920 (C.C.P.A.), cert. denied, 429 U.S. 986 (1976), the Court of Customs and Patent Appeals upheld the validity of the supplemental duties, finding that the President had authority to impose surcharges upon imported dutiable goods under Section 5(b) of the Trading With the Enemy Act, 50 U.S.C. app. 5(b).

After the decisions in *Yoshida* and *Alcan*, petitioners filed 18 lawsuits in the United States District Court for the Central District of California, seeking return of the supplemental duties on the theory that Proclamation No. 4074 exceeded the authority granted to the President by the Trading With the Enemy Act (Pet. 13; Pet. App. 2a-3a, 55a-56a). The government moved to dismiss these suits on the ground that the subject matter was within the exclusive jurisdiction of the Customs Court. Petitioners' actions were consolidated for decision of the jurisdictional issue (Pet. 14). On August 18, 1978, the district court granted the government's motion to dismiss, holding that the question "[w]hether the import duty surcharge was properly imposed

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[1]The surcharge imposed by Proclamation No. 4074 was terminated by Presidential Proclamation No. 4098, 3 C.F.R. 94 (1971-1974 Compilation) *and in* 86 Stat. 1591, on December 20, 1971.

or should be returned to the importers from whom it was collected raises an issue of substantive customs law" within the exclusive jurisdiction of the Customs Court (Pet. App. 59a).

The sole issue that petitioners presented on appeal was whether the district court had jurisdiction over their claims.[2] During the pendency of petitioners' appeal, the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727, became law, revising the statutes governing the status, jurisdiction and powers of the Customs Court (which was renamed the United States Court of International Trade). On November 5, 1980, one day before the court of appeals issued its decision in this case, petitioners' counsel informed the court of the Customs Courts Act, but stated that the Act did not affect the arguments "as thus far addressed on appeal" (Pet. App. 48a-49a). The opinion that the court of appeals thereafter entered, affirming the dismissal of petitioners' claims, made no reference to the Customs Courts Act, but relied only upon the former jurisdictional statutes and the cases construing them. Based on those authorities, the court concluded that "the presence of a substantial relation to the traditional customs purposes mandates that jurisdiction [over claims involving Proclamation No. 4074] rest in the Customs Court" (Pet. App. 17a-18a).

Eight days after the court of appeals issued its opinion, petitioners moved to alter the judgment, asking for the first time that their claims be transferred to the proper forum rather than dismissed (Pet. App. 22a-30a). In support of their motion, petitioners pointed out that 28 U.S.C. 1584(a) (added by Section 201 of the Customs Courts Act of 1980, 94 Stat. 1729)) permits a district court to order the transfer of a

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[2]In arguing that the district court had jurisdiction, petitioners relied primarily (Pet. App. 3a-4a) on Section 9 of the Trading With the Enemy Act, 50 U.S.C. app. 9.

case within the exclusive jurisdiction of the Court of International Trade but mistakenly filed in the district court. On December 3, 1980, the court of appeals denied petitioners' motion without opinion (Pet. App. 21a).

ARGUMENT

1. The decision of the court of appeals holding that 28 U.S.C. 1582 vested the Customs Court with exclusive jurisdiction over petitioners' claims is correct and accords with all relevant authorities. Further review is therefore unwarranted.

First, the decision below is consistent with that of the only other court that has directly addressed the question of the proper forum for challenging supplemental duties collected under Proclamation No. 4074. See *Henry Pollak, Inc.* v. *Blumenthal*, 444 F. Supp. 56 (D.D.C. 1977), aff'd mem., 593 F. 2d 1371 (D.C. Cir.), cert. denied, 444 U.S. 836 (1979). Second, the decision below is consistent with the decisions of the Court of Customs and Patent Appeals in *United States* v. *Yoshida International, Inc.*, *supra*, and *Alcan Sales* v. *United States*, *supra*, in which the court considered the merits of certain importers' challenges to the validity of Proclamation No. 4074. See page 2, *supra*. Finally, the decision of the court of appeals is consistent with the understanding of Congress (as expressed in Section 611 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2075) that surcharges imposed under Proclamation No. 4074 were "protestable" duties within the exclusive jurisdiction of the Customs Court pursuant to 28 U.S.C. 1582(a). The legislative history of Section 611 shows that Congress was aware both that the Customs Court had found Proclamation No. 4074 invalid in *Yoshida* and that the United States had appealed that decision to the Court of Customs and Patent Appeals. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 235 (1974). Congress desired to hold in abeyance (pending the appellate decision in *Yoshida*) resolution of

the various challenges that had been made with respect to the collection of supplemental duties under Proclamation No. 4074. *Ibid.* Accordingly, Congress in Section 611 extended the time for administrative review of protests to five years from the date that the protest was filed "in the case of any protest * * * involving the imposition of an import surcharge in the form of a supplemental duty pursuant to Presidential Proclamation 4074."[3] Pursuant to 28 U.S.C. 1582(a), the Customs Court had exclusive jurisdiction of "civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied * * * ."

2. The enactment of the Customs Courts Act of 1980 does not require reexamination of the decision of the court of appeals.[4] As amended by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1728), 28 U.S.C. 1581(a) provides that "the Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under Section 515 of the Tariff Act of 1930 * * *." This provision

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[3]Section 514 of the Tariff Act of 1930, 19 U.S.C. 1514, provides in part that "decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—* * * (2) the classification and rate and amount of duties chargeable; [and] (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury * * * shall be final and conclusive * * * unless a protest is filed in accordance with this section * * *." Proclamation No. 4074 delegated to the Secretary of the Treasury the authority to prescribe rules and regulations for implementing the supplemental duties at issue. Section 515 of the Tariff Act of 1930, 19 U.S.C. 1515, governs administrative review of protests and was, in effect, temporarily amended by Section 611 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2075. See S. Rep. No. 93-1298, 93d Cong., 2d Sess. 235 (1974).

[4]Under Section 701 of the Customs Courts Act of 1980 (94 Stat. 1747), all portions of that Act relevant to this case became effective on November 1, 1980, five days before the court of appeals rendered its decision.

"substantially restates" (H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 44 (1980)) the jurisdiction previously granted to the Customs Court under 28 U.S.C. 1582(a). Indeed, for the purpose of creating "a comprehensive system of judicial review of civil actions arising from import transactions" (H.R. Rep. No. 96-1235, *supra*, at 20), and "eliminat[ing] the confusion which currently exists as to the demarcation between the jurisdiction of the district courts and the Court of International Trade" (*id.* at 47), the Customs Courts Act of 1980 explicitly conferred on the Court of International Trade "a residual grant of jurisdictional authority" (*ibid.*) over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for— (1) revenue from imports or tonnage; [and] (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue * * * "(28 U.S.C. 1581(i), as amended by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1729)). Moreover, with respect to 28 U.S.C. 1340, which specifically excepts from the district courts' jurisdiction "matters within the jurisdiction of the Customs Court," the only change made by the Customs Courts Act of 1980 was to substitute a reference to the Court of International Trade for the reference to the Customs Court. See Customs Court Act of 1980, Pub. L. No. 96-417, Section 501, 94 Stat. 1742. Thus, the Customs Courts Act of 1980 not only reaffirms the allocation of jurisdiction relied upon by the court of appeals, but "makes it clear that all suits of the type specified are properly commenced only in the Court of International Trade" (H.R. Rep. No. 96-1235, *supra*, at 47).

3. Only after the court of appeals had affirmed the district court's dismissal of their claims did petitioners seek transfer of the case to the Court of International Trade. See Pet. App. 22a. In support of their motion to alter the judgment, petitioners relied for the first time upon 28

U.S.C. 1584(a), as added by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1729). The court of appeals properly denied petitioners' motion (see Pet. App. 21a).

a. 28 U.S.C. 1584(a) provides: "If a civil action within the exclusive jurisdiction of the Court of International Trade is commenced in a district court of the United States, the district court shall, in the interest of justice, transfer such civil action to the Court of International Trade * * * ." The legislative history shows that Section 1584 is "patterned after the provisions which govern suits in the Court of Claims" (S. Rep. No. 96-466, 96th Cong., 1st Sess. 13 (1979)). Although this Court has not had occasion to construe 28 U.S.C. 1406(c), the provision that governs transfer of cases from the district courts to the Court of Claims, the decisions of the lower federal courts have established that Section 1406(c) transfers are not a matter of right. Rather, the party seeking the transfer must establish that it is "in the interest of justice" to transfer the case instead of dismissing it. *Sherar* v. *Harless*, 561 F. 2d 791, 794 (9th Cir. 1977); *Eccles* v. *United States*, 396 F. Supp. 792, 796-797 (D. N.D. 1975). Cf. *Goewey* v. *United States*, 612 F. 2d 539, 541 (Ct. Cl. 1979); *Chicago Consortium, Inc.* v. *Brennan*, 599 F. 2d 138, 141 n.1 (7th Cir. 1979). Congress plainly intended that transfers under Section 1584 would also be committed to the discretion of the transferor courts. See H.R. Rep. No. 96-1235, 96th Cong., 2d Sess. 21, 50 (1980); S. Rep. No. 96-466, 96th Cong., 1st Sess. 13 (1979).

b. It is undisputed that petitioners never sought to have their claims transferred to the Court of International Trade until after the court of appeals had affirmed the district court's dismissal of those claims for lack of subject matter jurisdiction, some three years after petitioners had commenced their actions. See Pet. App. 22a. The courts have repeatedly held that the "interest of justice" is not served by transfers from the district courts to the Court of Claims

(rather than dismissal) where the party has unreasonably delayed in requesting such a transfer. See *Westside Property Owners* v. *Schlesinger*, 597 F. 2d 1214, 1220 (9th Cir. 1979); *United States* v. *Northern Colorado Water Conservancy District*, 449 F. 2d 1, 4 (10th Cir. 1971); *Peltzman* v. *Smith*, 404 F. 2d 335, 336 (2d Cir. 1968). Here, petitioners not only failed to request a transfer until after the court of appeals had rejected their jurisdictional arguments, but also expressly disclaimed any reliance (prior to the decision of the court of appeals) upon the Customs Courts Act of 1980, the source of Section 1584(a). See Pet. App. 48a-49a. Moreover, even when petitioners finally sought a transfer, they failed to show why that relief would be in the "interest of justice."[5] See Pet. App. 27a-30a. Cf. *Brown* v. *Grimm*, 624 F. 2d 58, 59 (7th Cir. 1980).

Finally, petitioners' reliance (Pet. 19-29) upon *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463 (1962), is misplaced. The Court there held that transfer of a case under 28 U.S.C. 1406(a) from an improper venue was not precluded by the failure of the transferor court to obtain personal jurisdiction over the defendant. However, the Court recognized in

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[5]Petitioners imply (Pet. 27-28) that they now seek a transfer to avoid a statute of limitations defense that might be raised if they were to refile their claims in the proper forum. Inasmuch as the record does not indicate whether petitioners ever filed protests with respect to the collection of the supplemental duties that they challenge, or whether any such protests were ever acted on, it is impossible to ascertain whether petitioners' claims would be cognizable at all (let alone barred by the statute of limitations) should petitioners now file suit in the Court of International Trade. See *Knickerbocker Liquors Corp.* v. *United States*, 432 F. Supp. 1347 (Cust. Ct. 1977); 28 U.S.C. 2636(a), as added by Section 201 of the Customs Courts Act of 1980 (94 Stat. 1734).

At all events, whatever procedural hurdles petitioners now face are the direct result of their own forum shopping. Petitioners candidly admit (Pet. 13) that they sought to invoke the jurisdiction of the district court "[i]n consequence of" the decisions of the Court of Customs and Patent Appeals sustaining the validity of Proclamation No. 4074.

Goldlawr that the plaintiff did not have an absolute right to a transfer. 369 U.S. at 466-467. See 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3827, at 169-170, 173 n.14 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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